RECENT AMERICAN DECISIONS.

In the United States Court of Claims—January 1856.

STURGES, BENNETT & CO. *vs.* THE UNITED STATES.

1. Where certain liquors were imported into the United States in casks, which upon being gauged were found to be reduced in quantity by leakage, it was held that no duties could be imposed except upon the quantity which actually arrived in the country, and which is to be ascertained by the gauger's return.
2. Mode of recovering excess of duties, or estimated duties under Acts of March 3, 1839; February 26, 1845, and August 8, 1846, considered and commented on.

Messrs. *Charles Abert* and *John O. Sargent*, for claimants.

M. Blair, solicitor for United States.

The opinion of the court was delivered by

SCARBURGH, J.—In this case the petitioners allege, that during the years 1847, 1848, 1849, and 1850, they imported into the United States certain quantities of brandy and other liquors in casks, and paid duties thereon at the rate of one hundred *per centum*, not only on the value of the quantity of liquor ascertained by gauge to be contained in the casks, but also on the value of the quantity of liquor which had leaked out of the casks on the voyage of importation; and that they claim a return of the moneys extracted from them as import duties on such leakage, or non-imported liquors.

The petitioners refer in their petition to a statement prepared by the collector of New York, by order of the Secretary of the Treasury, for a particular account of their claim. From this statement, it appears that, under instructions of the Secretary of the Treasury, the duties upon their importations were levied according to their invoice value, without reference to deficiencies, unless arising from accident at sea. It was conceded in the argument submitted in this case, that the leakage arose not from any accident at sea, but from other causes, and that the deficiency was ascertained from the return of the gaugers.

The act of Congress entitled "An act reducing the duty on imports, and for other purposes," approved July 30th, 1846, imposed

a duty of *one hundred per centum ad valorem* on brandy and other spirits, distilled from grain or other materials imported from foreign countries. According to the principles settled by the cases of *Marriott* vs. *Brune*, 9 How. 619; *The United States* vs. *Southmayd*, Ibid. 637; and *Lawrence* vs. *Caswell*, 12 How. 488—this duty is imposed, not upon the quantity of brandy which may have been purchased abroad, but upon the quantity which actually arrives in the country.

In the case of *Marriott* vs. *Brune*, duties had been imposed upon importations of sugar and molasses made after the act of 1846, according to invoice quantity; but the report of the weighers and gaugers showed a deficiency between that quantity and the quantity actually imported. Mr. Justice Woodbury, who delivered the opinion of the court, said: "The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported;* for nothing is imported until it comes within the limits of a port. (See cases cited in *Harrison* vs. *Vose*, 9 Howard, 372.) And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries, or the importation from them, or what is imported. (5 Stat. at Large, 548, 558.) The very act under consideration imposes the duty on what is imported from foreign countries. (p. 68.) The Constitution uses like language on the subject. (Article 1, sects. 8 and 9.) Indeed, the general definition of customs confirms this view; for, says McCulloch, (Vol. I. p. 548) "Customs are duties charged upon commodities on their being imported into or exported from a country."

"As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country;—that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more.

"When the duty was specific on this article, being a certain rate per pound before the act of 1846, it could of course extend to no

larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed.

"On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly—a mere fiction of law—and is not to be countenanced when not expressed in acts of Congress, nor required to enforce just rights."

The same doctrine is directly applied to importations of brandy, in the case of *Lawrence* vs. *Caswell.*

It is moreover held, in these cases, that the quantity actually imported is to be ascertained by the gauger's return. In the case of *Lawrence* vs. *Caswell*, the question whether the duty ought to be computed on the quantity stated in the invoices, or on the contents as ascertained by the gauger's return, was, *in terms*, considered by the court, and the decision was, that the duty ought to be computed on the latter, and that this question was substantially the same with that decided in the case of *Marriott* vs. *Brune.* It may be true, as suggested by the Solicitor, that there is no mode in which the quantity imported can be ascertained with absolute certainty; but there can be no doubt, we think, that the decision of the Supreme Court, recognizing the measurement by gauge as the proper legal method for that purpose, is in conformity both to the acts of Congress and to the usage of the government of the United States for more than half a century.

It is apparent, therefore, that the duties, now sought to be reclaimed, were paid upon brandies not actually imported, and, consequently, that they were not imposed by law. If, therefore, the petitioners be not entitled to relief, it is not because they have not paid the United States money which the acts of Congress did not require them to pay, but because they paid it under such circumstances as took from them the right to require its re-payment.

Prior to the act of March 3d, A. D. 1839, an importer might

maintain an action for the recovery of the excess of duties, or for the recovery of duties illegally exacted against a collector, in two classes of cases: 1st, where the payment was made for unascertained or estimated duties; and, 2d, where it was made under protest. These two classes are distinctly recognized by Daniell, J., in the opinion delivered by him for the majority of the court, in the case of *Carey* vs. *Curtis*, 3 Howard, 243. He said: "It will be remembered that the two principal cases, in which collectors have claimed the right to retain, have been those of unascertained duties, and of suits brought, or threatened to be brought, for the recovery of duties paid under protest. It is matter of history that the alleged right to retain on these two accounts had led to great abuses and to much loss to the public; and it is to these *two* subjects, therefore, that the act of Congress particularly addresses itself." Again: "Besides the litigation spoken of, and which is said to lead to this result, is a litigation for duties paid under protest, and not for overpayment of unascertained duties." (9 How. 242.) Again: "Independently of this statute, the collector might have sued for overpayments on unascertained duties, as well as for duties paid under protest. And it can hardly be reconciled with reason or consistency, that Congress designed to preserve the right of suit in the one case and deny it in the other. Yet, if these words would have the force contended for by the defendant in error, they give the right of action against the collector for duties paid under protest only, leaving the party who has overpaid unascertained and estimated duties no remedy but that of resorting to the Secretary of the Treasury." Ibid. 244.

The effect of the act of March 3d, 1839, was to take away the right of action against collectors in both these classes of cases. (*Carey* vs. *Curtis*, 3 Howard, 236.) But by way of compensation to the importer for the loss of his remedy by action, this act made it the duty of the Secretary of the Treasury, where it should be shown to his satisfaction that in any case of unascertained duties, or duties paid under protest, more money had been paid to the collector or person acting as such than the law required should have been paid, to take the prescribed measures to have it refunded to

the person entitled to the over-payment. It may be proper to remark at this point, (1) that this act did not in any way affect or propose to affect the right of a party making an over-payment in any case therein mentioned to re-payment; and (2) that the power which it confers upon the Secretary of the Treasury is purely *administrative*, and in no sense judicial. If, therefore, under this act, an importer, in a case either of unascertained duties or of duties paid under protest, paid to a collector more money than he was by law required to pay, but could not show to the satisfaction of the Secretary of the Treasury that he had done so, he was without any enforceable remedy; but, nevertheless, the action of the Secretary of the Treasury not being *judicial*, but merely *administrative*, the implied contract of the United States to refund to the importer what had been taken or detained from him without authority of law still remained unsatisfied and undischarged.

Soon after the decision in the case of *Carey* vs. *Curtis* was made, the act of February twenty-sixth, A. D. eighteen hundred and forty-five, was passed. What changes in the law were effected by it? 1. It restored *sub modo* the right of action against a collector in cases of duties paid under protest. And, 2. It required the protest to be made in writing and signed by the claimant at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof. It is as follows: "That nothing contained in the second section of the act entitled 'An act making appropriations for the civil and diplomatic expenses of the government, for the year one thousand eight hundred and thirty-nine,' approved on the third day of March, one thousand eight hundred and thirty-nine, shall take away or be construed to take away or impair the right of any person or persons who have paid or shall hereafter pay money as and for duties under protest to any collector of the customs or other person acting as such, in order to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector or other person acting as such, to ascertain and try the legality and validity of such demand and payment of

duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically, the grounds of objection to the payment thereof." (5 Stat. at Large, 727.)

But this act is silent upon the subject of unascertained duties. It mentions only duties paid under protest. It is wholly inapplicable, therefore, to unascertained duties, and the rights of an importer in reference to the latter remained the same after as they were before the passage of that act.

The only remaining act of Congress at all connected with the subject, is the act of August 8, A. D. 1846. The second section of that act is as follows: "That the Secretary of the Treasury be, and he is hereby authorized, out of any money in the treasury not otherwise appropriated, to refund to the several persons entitled thereto such sums of money as have been illegally exacted by collectors of the customs under the sanction of the Treasury Department, for duties on imported merchandise since the third of March, eighteen hundred and thirty-three: *Provided*, that before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States upon the principle involved, that such duties were illegally exacted. *And provided also*, that such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction." (9 Stat. at Large, 84.)

That statute has no application to unascertained duties. It in terms applies only to duties *illegally exacted*. Now, unascertained duties, in the strictest sense of those terms, certainly as applicable to a case like the one now under consideration, are not illegally exacted. There can be no illegality as respects them, except in

the detention of the over-payment after the true amount of duties has been legally ascertained.

When an entry is made, the collector, jointly with the naval officer, or alone where there is none, is required by law to make a gross estimate of the amount of duties on the goods entered, and if the goods be entered for home consumption, and not warehoused, no permit will be granted for landing them, until such estimated duties are paid. (1 Stat. at L., p. 664, § 49; 1 Ibid., p. 673, § 62; 9 Ibid., p. 53, § 1.) And if it be necessary, in order to ascertain the duties thereon, to weigh, gauge, or measure the goods, they cannot, without the consent of the proper officer, be removed from the place where they are landed, before they have been weighed, gauged or measured; and if spirits, before the proof or quality and quantity thereof are ascertained and marked thereon, by or under the direction of the proper officer for that purpose. (1 Stat. at L., p. 665, § 51.) So far, therefore, from unascertained duties being duties illegally exacted, they are always demanded and paid in strict conformity to law. The very terms imply that duties are, to some extent, imposed and payable in the particular case, but that the true amount is unknown and unascertained at the time of payment.

The law, in its requirements upon this subject, looks both to the security of the United States, and to the interests of the importer; the just demands of the United States are secured by the payment of the estimated duties, and the goods are liberated without any unnecessary delay, so that they may at once go into the possession of the importer, and enter into his business. But the object, as regards the United States, is to secure their just demands, and nothing more; and the payment is made under an implied contract on the part of the United States, that the excess, if any, beyond the amount of duties actually imposed by law, shall be refunded to the importer. There can be no doubt, then, that in the legal sense, unascertained duties are never illegally exacted, and, consequently, that the second section of the act of Aug. 8, 1846, does not apply to them.

According to these principles, the case under consideration is, in its nature, a case of unascertained duties; but it is insisted on the

part of the United States, that at the time when the importations which it embraces were made, the duties thereon, under a regulation of the Treasury Department, were required to be computed on the invoice quantity, and that the duties in question were therefore ascertained at the time of their payment. Without pausing to inquire whether the consequences deduced from this regulation would necessarily have followed, it is sufficient to remark, that the regulation itself was in conflict with law, and invalid. *Marriott* vs. *Brune*; *The United States* vs. *Southmayd*; *Lawrence* vs. *Caswell*.

"The Secretary of the Treasury is bound by the law, and although in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law, yet neither he nor those who act under him, can dispense with or alter any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights and unsupported by law, should afford no ground for legal redress." Per Mr. Justice M'Lean, in *Tracy* vs. *Swartwout*, 10 Peters, 95.

"Any instructions from the Treasury Department could not change the law." Per Mr. Justice Thompson, in *Elliott* vs. *Swartwout*, 10 Peters, 135.

"The various circulars from the Treasury Department, which have been referred to, and which have been construed in some cases to permit the deduction of the quantity not really arriving in this country, and in others to forbid it, are entitled to much respect in deciding on the true meaning of the revenue laws; but when contradictory or obscure, they furnish less aid, and are *never* decisive or incontrollable." Per Mr. Justice Woodbury, in *Marriott* vs. *Brune*, 9 Howard, 634–5.

"The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinions of them; and importers, in cases of doubt, are entitled to have their rights settled by the judicial exposition of these laws, rather than by the views of the department. *Marriott* vs. *Brune*, 9 Howard, 634, 635.

And though, as between the custom-house officers and the department, the latter must by law control the course of proceeding (5 Stat. at Large, 566), yet, as between them and the importers, it is well settled that the legality of all their doings may be revised in the judicial tribunals. *Tracy et al.* vs. *Swartwout*, 10 Peters, 95; *United States* vs. *Lyman*, 1 Mason C. C. 534; Opinions of Attorneys General, 1015." *Per* Mr. Justice Woodbury, in *Greely* vs. *Thompson*, 10 Howard, 254.

The regulation of the Treasury Department referred to by the Solicitor, cannot therefore have the influence or effect claimed for it in his argument. The duties in question here are, in their nature, under the acts of Congress, unascertained at the time of their payment, and no regulation of the Treasury Department could deprive the petitioners of the right vested in them by law so to consider and treat them. The obvious reason is, that no such regulation can change the supreme law of the land.

This then being a case of unascertained duties, it was competent for the Secretary of the Treasury, under the act of March 3, 1839, which, for this purpose, is still in force, if it had been shown to his satisfaction that more money had been paid to the collector than the law required should have been paid, to have taken the measures presented by that act to have it refunded to the petitioners. But this, the petitioners allege, he has refused to do upon the grounds that no protest was made, and that a portion of the claim was barred by the statute of limitations. The petitioners, therefore, are entitled to relief unless the action of the Secretary of the Treasury is conclusive against them. We have already stated, that the power of the Secretary of the Treasury under that act is purely administrative, and in no sense judicial. This is sufficiently obvious from the very terms of the act. It did not vest the Secretary of the Treasury with the power of deciding upon the rights of the claimant, except to the extent that he might be required to act upon them. It made it a condition precedent to the party's right to the Secretary's warrant upon the Treasurer for the over-payment, that he should satisfy the former that his claim belonged to one of the classes mentioned in the act, and was well founded. This mode of redress

was thus conditioned and restrained, and for wise and good reasons. It would not have been either proper or politic to have authorized a payment out of the public treasury, to a party whose rights had not been regularly adjudicated and legally ascertained, except upon the very condition imposed by the statute, that he should show to the satisfaction of the head of the Treasury Department that his case was one for which the statute meant to provide. It was not designed that he should obtain relief from a ministerial officer, unless his case was shown to be one on which such officer could act with entire safety to the public interests. If he failed to show such a case, then he failed to obtain the benefit of the statutory remedy; but it was not designed that his rights should be otherwise affected. The implied contract of the United States, in a case of unascertained duties to refund the over-payment, would still continue in full vigor —the decision of the Secretary of the Treasury affecting merely his own official action, and nothing more. And it is no answer to this view, that in such a case the party was without remedy, except by an appeal to the legislative department of the government; for if that were sufficient, then there would be but few cases of contract of which this court could take cognizance.

In the Supreme Court of Indiana.

Before PERKINS, J.

HERMAN *vs.* THE STATE.

1. A law which absolutely forbids the people of the State to manufacture and sell whiskey, ale, porter and beer, for use as a beverage, or at all, except for the government, to be sold by it as medicine, and absolutely prohibits the use of these articles as a beverage, is unconstitutional. Per PERKINS, J.

2. It is an invasion by the government upon the faculties of industry possessed by individuals, when it attempts to appropriate to itself any particular branches of industry, or any business which is not of a public general character.

3. There are certain absolute rights, and the right of property is among them, which in all free governments must of necessity be protected from legislative interference, irrespective of constitutional checks and guards.

4. The power of the legislature to declare nuisances.